SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 42

JOHN W. WEBB,

Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DECIDED BY THIS COURT ON THE MERITS ON FEBRUARY 25, 1957

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING

AND

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF SAID PETITION FOR REHEARING, TO BE CONSIDERED IN CASE SAID MOTION FOR LEAVE TO FILE BE GRANTED.

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TABLE OF CASES, CONSTITUTIONAL PROVISIONS, STATUTES, COURT RULES AND TEXTS CITED

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING.

The Association of American Railroads (AAR) hereby respectfully moves the Court for leave to file a brief *amicus curiae* in this case in support of respondent's petition for rehearing. The consent of counsel for the respondent has been obtained. The consent of counsel for the petitioner has been requested but refused. Hence this petition is filed under Rule 42 (2) and (3). Since our time and respondent's time run concurrently, expiring on Friday, March 22,

1957, four days after our employment in this matter, this motion and the subjoined brief have had to be prepared without our having had the benefit of seeing respondent's Petition for Rehearing, which we are informed it intends to file.

The movant, The Association of American Railroads, hereafter, referred to as "AAR," is a voluntary, unincorporated, non-profit organization composed of member railroad companies operating in the United States, Canada and Mexico. Full membership is open to all Class I railroads as now classified by the Interstate Commerce Commission, that is, all having gross annual operating revenues of three million dollars or more, and there is provision for associate membership by railroads and terminal and switching companies having less than that amount of gross annual operating revenues, all of which latter are now classified as Class II railroads.

There are at present 187 full members and 164 associate members of AAR. The Class I member railroads operate over 99 per cent. of the total railroad mileage of Class I railroads in the United States and have gross operating revenues of over 99 per cent. of the total Class I operating revenues in this country. The activities of AAR cover a wide range having to do with such matters as research, operations, car service, traffic, safety, public relations, accounting, statistics, law and federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public.

AAR, as the joint representative and agent of these member and associate member railroads, has a vital interest in the developments of the law of the Federal Employers' Liability Act, 45 U.S.C. 51-60 (1952 ed.)—hereinafter called "FELA"—and in the changing interpretations of that substantive law in the decisions of this Court in the last sixteen

years. That interest is different from, and broader than, the interest of a particular member railroad in a particular case it may have before this Court under the Act, since the particular litigant is immersed in the facts in evidence, pleadings, and particular contentions, arguments and holdings of courts below in its particular case, often to the exclusion, to some extent, of a broad view of the developments of the general and fundamental principles of the substantive law under the Act.

AAR is informed, believes and, therefore, alleges that respondent in this case will make timely filing of a petition for rehearing in which it will pray this Court to reconsider the facts in evidence herein as well as to reconsider and modify its opinion and judgment herein of February 25, 1957. AAR, if this motion for leave to file brief *amicus curiae* in support of respondent's said petition for rehearing be granted, does not intend to ask or urge this Court to give a still further reappraisal of the facts in evidence herein, or of particularities of pleadings, motions, contentions, or other technical matters. We shall confine our presentation to consideration of the Court's opinion and judgment herein and to pointing out important respects in which it is not in harmony with other pertinent decisions of this Court and serves to leave the substantive law of the FELA, not in a state of greater clarity and certainty, but in a state of even greater confusion, than heretofore, so that state trial and appellate courts and federal district and circuit judges, and the bar of this country, will have more difficulty than ever before in educing from this Court's decisions a coherent pattern of controlling principles of the law of negligence as applicable in cases arising under the FELA. In speaking of such cases, we mean, of course, cases such as this one, involving simple, common-law concepts of negligence and causation, unaffected by any allegations of violation by the railroad-defendant of any of the safety appli-

ance statutes of Congress, violation of which imposes upon the violator an absolute legal liability for damages, regardless of fault. These reasons lead us to believe that important questions of law which we intend to present, and which we shall submit are highly relevant to final disposition of this case, will not be so adequately presented by the parties as we may present them if this motion be granted.

AAR further has a vital interest in the ever-larger amounts of operating revenues which its members have to disburse annually in satisfaction of claims and suits under the FELA, amounts totalling many millions of dollars annually, amounts which have more than doubled and trebled in the past fifteen or sixteen years, in large part by reason of the changing principles applied by this Court in the course of its decisions under the FELA. For example, the most recently available statistics show that for the period April 1, 1955, to December 31, 1955, its Class I member railroads paid out for employee injuries and fatalities alone, not including payments to passengers, cross-accident claimants, trespassers or other non-employees, in suits under the FELA $22,164,140, and in settlements of claims under that Act $4,114,441, or a total of $26,278,441. For the full year 1956, the same members paid out in such suits $28,328,285 and in settlement of such claims $4,626,378 or a total of $32,954,663.

The grand totals for the same Class I member railroads for the full period of four years and four months, from September 1, 1952 through December 31, 1956, were as follows:

Number of suits	7,106	
Amounts of settlements of suits		$ 99,470,153
Claims settled	2,908	
Amount of claims settlements		$ 24,420,944
Aggregate payments		$123,891,097

No such statistics were kept prior to September 1, 1952 and AAR had no department keeping such statistics prior to that date. It should be observed that no claims settled directly with claimants who did not have lawyers are included, and there were a great many of these of which we have no records.

And it must be remembered that the public ultimately must bear such enormous burdens on operating revenues and that they are at much higher rates for the public-servant railroads than for privately operated profit industries which are, by and large, covered by Workmen's Compensation Acts, which impose liability without fault but, in compensation for granting to injured employees and imposing upon employers such substantive, automatic liability, strictly limit recoveries to carefully established amounts graduated according to the nature of the injury.

Wherefore, your movant respectfully prays that this motion be granted and presents and files its separate brief *amicus curiae,* bound in the same pamphlet with this motion, upon which it will rely if the present motion be granted. This we understand to be the proper practice under revised Rule 42, see Stern and Gressman, *Supreme Court Practice—Second Edition—Revised Rules,* pp. 316-317.

Respectfully submitted,

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Counsel for the movant, The Association of American Railroads.

Of Counsel:

FRANCIS M. SHEA,
SHEA, GREENMAN, GARDNER & MCCONNAUGHEY.

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING.

I

INTEREST OF AMICUS CURIAE

A concise statement of the interest of The Association of American Railroads—hereinafter called "AAR"—is set out in the preceding motion for leave to file this brief, as required by Rule 42(3). Instead of repeating that state-

ment here, we believe it to be the better practice to, and we do, refer to that statement and ask that it be considered as incorporated here by reference and as proper compliance with Rule 42 (5) requiring that a brief *amicus curiae* "set forth the interest of the *amicus curiae*, * * *."

We do not undertake to make a Statement of the Case but fully adopt the statement to be made by respondent in its petition for rehearing. There is no question of jurisdiction. This Court has taken jurisdiction and exercised it on the merits. We do not deem it to be proper for a "friend of the Court" to undertake to tell this Court about the details of a case with which the Court was already thoroughly familiar long before this "friend" became acquainted with the case at all.

We do here merely point out, as already suggested in the foregoing motion, that this case involves no allegation or contention that the respondent railroad violated any federal, statutory safety appliance requirement, a violation of which would impose upon the violator an absolute liability as a matter of law for damages to any employee injured as a result of such violation. We have in this case, therefore, only the simple and familiar common-law concepts of negligence and causation on the question of liability *vel non* and the customary questions as to the respective functions of juries, trial courts and appellate courts in such uncomplicated cases under the FELA. But we do have conflict between this Court's opinion and judgment in this case and its well-considered opinions and judgments in other comparable and recent cases, as we shall undertake to demonstrate.

II

ARGUMENT

Point I

Case No. 46, Herdman v. Pennsylvania Railroad Co., decided on the same day as this case, read alone, seems to apply the correct rules of the substantive law of negligence applicable to cases of this character under the FELA, but it fails to distinguish itself from this case, No. 42, and from two other cognate cases, Nos. 28 and 59, decided the same day, and the said four cases, grouped together for purposes of dissent in the four cases and of concurrence in No. 46 and dissent in Nos. 28, 42 and 59, and the result of their divergent opinions, leave the controlling law in a state of unfortunate confusion.

We do not see how the Court could have reached any other result than that which it reached in No. 46, *Herdman*. Railroads are required to have their locomotives equipped with efficient air-brakes making possible emergency applications of brakes. Pennsylvania's freight locomotive engineer made such an emergency application in a dire emergency, to prevent striking an automobile, containing innocent people, including school children, with an inevitably resulting sudden stop, which threw down and injured the conductor in the caboose at the end of the train. Pennsylvania was fortunate in having as its employee-conductor and plaintiff in the suit against it a man of extraordinary frankness and candor as a witness in his own behalf. He testified as to the above facts and as to his fall and injury. He did not testify, as a plaintiff often would do, that the stop was made with any special or unusual severity. He did not claim that such unscheduled and sudden stops of trains are unusual or extrordinary

occurrences. He was honest enough to testify: "We got to expect them or think about them." The Court of Appeals for the Sixth Circuit agreed with the District Court that there was a complete absence of probative facts to support a conclusion of railroad negligence. This Court granted certiorari to determine whether the petitioner was erroneously deprived of a jury determination of his case. It held that he was not so erroneously deprived and affirmed the judgment of the Court of Appeals. Mr. Justice Frankfurter dissented from the granting of certiorari. Mr. Justice Harlan concurred in this Court's decision.

If we can read that opinion and decision rightly, it contains implicitly and gives effect to the following fundamental principles, which we think should be declared explicitly and reaffirmed in clear terms, substantially as they were declared in *Brady* v. *Southern Railway*, 320 U.S. 476 (1943):

1. The FELA does not impose upon railroads liability without fault;

2. It does not make railroads insurers of the safety of their employees;

3. It does not impose upon them liability based merely upon the fact of injury to an employee while within the scope of his employment;

4. It is still a negligence statute and the burden is upon the plaintiff to adduce evidence of probative facts sufficient to support a reasonable conclusion of railroad negligence from which the injury or death resulted "in whole or in part," in the absence of which proof it is the duty of the trial court to take the case from the jury, either by directed verdict for the defendant, or by judgment for defendant *n.o.v.*, or by setting aside the verdict if it has been rendered, and it is likewise the duty of the appellate court to reverse the trial court if it fails to do so.

As Mr. Justice Harlan well said in his opinion concurring in No. 46 and dissenting in Nos. 28, 42 and 59, "No scientific or precise yardstick can be devised to test the sufficiency of the evidence in a negligence case. The problem has always been one of judgment, to be applied in view of the purposes of the statute. It has, however, been common ground that a verdict must be based on evidence—not on a scintilla of evidence but evidence sufficient to enable a *reasoning* man to infer both negligence and causation by *reasoning from the evidence*. *Moore* v. *Chesapeake & O. R. Co.*, 340 U.S. 573. And it has always been the function of the court to see to it that jury verdicts stay within that boundary, that they be arrived at by reason and not by will or sheer speculation. Neither the Seventh Amendment nor the Federal Employers' Liability Act lifted that duty from the courts." (The italics for emphasis are Mr. Justice Harlan's).

That the Seventh Amendment did not lift that duty from the courts is the clear teaching of the opinion of Mr. Justice Rutledge for this Court in *Galloway* v. *United States*, 319 U.S. 372 (1943). At page 395 of its opinion in that case, this Court dealt with "standards of proof" our courts have traditionally required for submission of evidence to the jury. It said that the matter is not greatly aided by substituting one formula for another and concluded, in words highly relevant to the present case:

> " * * * Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. * * * "

The whole paragraph ended with the statement, "If there is abuse in this respect, the obvious remedy is by correc-

tion on appellate review." And those quotations are from a lengthy and carefully reasoned opinion in which this Court had before it, throughout, the question as to the effect and application, if any, of the Seventh Amendment on this very matter of courts taking cases from juries.

Since the Seventh Amendment, the act of the sovereign people, did not, as Mr. Justice Harlan says, and as this Court held in *Galloway*, lift that duty from the courts, it seems plain that the FELA *a fortiori* did not and could not have such effect.

It further seems plain that that is the necessary effect of this Court's decision in No. 46, *Herdman*, decided the same day as the present case.

Point II

The opinion of this Court in the instant case, No. 42, not only does not clarify the law, it further confuses it. It does worse than that. It tells the bench, the bar, and the public that juries must be allowed to base verdicts in these FELA cases on speculation and conjecture. The opinion should be revised so as to eliminate that holding.

We had hoped that this Court's decision in *Lavender* v. *Kurn*, 327 U.S. 645 (1946), in which a majority of this Court as then constituted expressly authorized juries in these FELA cases to base verdicts for plaintiffs on pure speculation and conjecture, had been tacitly allowed quietly and gracefully to repose in the limbo of unfortunate decisions which had best be forgotten. Recovery of verdict for damages in that case itself was affirmed on the basis of purely speculative and conjectural evidence. Mr. Justice Murphy, who wrote the opinion for this Court himself expressly indulged in pure speculation and conjecture in his opinion.

For a full analysis of that case, see Alderman, *What the New Supreme Court Has Done to the Old Law of Neg-*

ligence, 18 Law & Contemp. Prob. 110-159, at 133-138. Since Mr. Justice Frankfurter, in his dissent in Nos. 28, 42, 46 and 59, cites his own book, perhaps the author of this brief may be forgiven for citing his own law review article, in spite of its perhaps irreverent, but certainly not irrelevant, title. It was one of only two articles written from the railroad employer viewpoint in that most complete symposium on the FELA ever published. The other paper therein written from the railroad viewpoint, was Gibson, *The Venue Clause and Transportation of Lawsuits, ibid.*, pp. 367-431.

The *Lavender* case produced an extraordinary reaction among the lower federal courts, which have the primary responsibility for the administration of FELA. See the comments by Circuit Judge Major in *Griswold* v. *Gardner*, 155 F. 2d 333-334 (7th Ct. 1946), decided less than two months after this Court decided *Lavender*.

We had hoped that *Lavender* had been stored in a chest with "old lace." But in this Court's opinion in this case, in footnote 6, *Lavender* is brought forth and revivified and juries are again expressly authorized to base verdicts for plaintiffs on speculation and conjecture. It is rather unusual for this Court to make such a far-reaching holding and re-affirmance in a footnote. Footnotes are helpful devices when properly employed, but we submit that they are not the proper medium for holdings which revolutionize long-settled and fundamental principles of law. We earnestly urge the Court to modify the opinions both in this case and in No. 28, which are inseparable and contemporaneous declarations on the same narrow body of law, and eliminate the authorization to juries to base verdicts for plantiffs in these cases on mere speculation and conjecture. Unless that is done, the FELA becomes in deed and truth a statute favoring railroad employees with the advantages of the compensation principle of damages without fault of

the employer and based on the fact of injury alone, but not granting to the paying-employers the corresponding right not to have to face juries—with the "sky the limit" or, at least, the vicarious generosity of trial judges the only limit, on the amount of awards. This violates the whole philosophy of workmen's compensation acts.

Point III

The opinion of this Court in the instant case, No. 42, is further confused by the confusions to be found in this Court's opinion in No. 28, Rogers v. Missouri Pacific Railroad, which will certainly be read together with the opinion in this case handed down on the same day. The opinions in both cases should be modified to bring them into harmony with fundamental principles of the law of negligence and causation.

We respectfully submit that this Court's opinion in No. 28, which will be generally read in conjunction with its opinion in this case, No. 42, adds confusion to that found in the opinion in this case itself and that both of said opinions are in conflict with this Court's opinon on the same day in No. 46, *Herdman* v. *Pennsylvania Railroad Co.*

The opinions in Nos. 28, 42, and 59 led Mr. Justice Harlan to say in his dissent, "However, in judging these cases, the Court appears to me to have departed from these long-established standards, for, as I read these opinions, the implication seems to be that the question, at least as to the element of causation, is not whether the evidence is sufficient to convince a reasoning man, but whether there is any scintilla of evidence at all to justify the jury verdicts. I cannot agree with such a standard, for I consider it a departure from a wise rule of law, not justified either by the provision of the FELA making employers liable for injuries resulting 'in whole or in

part' from their negligence, or by anything else in the Act or its history, which evince no purpose to depart in these respects from common-law rules."

Thus Mr. Justice Harlan puts our criticisms of the Court's opinions in this case, No. 42, and in Nos. 28 and 59, much more effectively than we could have put them ourselves.

It is to be noted that Mr. Justice Reed dissented in this case and in Nos. 28 and 59 and that Mr. Justice Burton did not concur in the language of the opinions in the three cases, limiting his concurrence to the result. Mr. Justice Reed has now retired and his successor has been nominated and confirmed. The personnel of the Court is again undergoing a change. It would seem to be quite appropriate for the Court to grant a rehearing in this case and to reconsider and modify its opinion herein, which has evoked such criticism from members of the Court.

In the opinion in No. 28, after stating the facts and disapproving one ground upon which the Supreme Court of Missouri had based its opinion and judgment in that case, this Court apparently undertook to make a careful clarification of the law of negligence as it should be applied in cases of this character under the FELA. But, with greatest respect, we submit that it used language which not only did not clarify but, on the contrary, succeeded in more thoroughly confusing the state of this particular branch of federal law than has ever been done before. This Court there said:

> "The opinion may also be read as basing the reversal on another ground, namely, that it appeared to the court [below] that the petitioner's conduct was at least as probable a cause for his mishap as any negligence of the respondent, and that in such case

there was no case for the jury. But that would mean that there is no jury question in actions under this statute, although the employee's proofs support with reason a verdict in his favor, unless the judge can say that the jury may exclude the idea that his injury was due to causes with which the defendant was not connected, or, stated another way, unless his proofs are so strong that the jury, on grounds of probability, may exclude a conclusion favorable to the defendant. That is not the governing principle defining the proof which requires a submission to the jury in these cases. * * *"

That may be exposition in accordance with the old school rhetoric principle of beginning exposition by first stating "what a thing is not." But not only is the whole negative approach here confusing, also the expository second sentence of that quotation is so shot through with negatives piled upon negatives, (negative in "there is no jury question," negative in "although," negative in "unless the judge can say that the jury may exclude" [that is, find a negative], negative in "causes with which the defendant was not connected," negative in "unless his proofs are so strong," negative in "that the jury * * * may exclude a conclusion,") that the reader cannot escape the feeling that the author of the expository passage has actually double-negatived himself into stating the very opposite of what he intended. We could get no meaning whatsoever out of the passage until we had re-read it half a dozen times, and then only a glimmer of meaning. According to our count there are six distinct negatives in the one sentence, which equals three double negatives, or three affirmatives, which we feel sure the author did not intend. Rather we assume that he intended

to fortify an ultimate negative assertion in the sentence by multiplying negatives for intensification. However that may be, we feel certain that the bench and bar of the nation will have great trouble parsing out the meaning of that expository statement.

We are not helped much in our understanding of the Court's meaning in that case when it completed "saying what a thing is not" and took up the affirmative approach. Thus it was said, "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." That statement takes a simple, statutory positive, "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier," and exalts it into a judicial superlative, "even in the slightest." This inevitably suggests that the Court is changing the settled federal rule that a mere scintilla of evidence will not support a jury verdict,[1] and substituting the old so-called "scintilla rule" which some state courts used to apply to FELA cases until this Court's decisions put a stop to the practice.

That last quoted passage from the opinion in No. 28 is further confused by the citation to it, in footnote 11, of *Coray* v. *Southern Pacific Co.*, 335 U. S. 520, which was not this kind of case at all but was a case involving alleged violation of a safety appliance act of Congress, a violation of which would impose absolute liability on the violator. No question of negligence of the carrier was involved in that case. It does not improve clarification to cite it here.

Later in the affirmative statement this Court slightly

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[1] *Baltimore & Ohio R. Co.* v. *Groeger*, 266 U. S. 521, 524 (1925); *Western & Atlantic R. Co.* v. *Hughes*, 278 U. S. 496, 498 (1929); *Brady* v. *Southern Railway Co.*, 320 U.S. 476, 479 (1943).

misquoted from the FELA the words "in whole or in part to its [the statutory words are "from the"] negligence" and underscored the words "in part" for emphasis. Then the Court again put its superlative gloss on the statutory positive, saying:

> "The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. [Citing as "a comprehensive survey of the history of the FELA," Griffith, *The Vindication of a National Public Policy under the Federal Employers' Act*, 18 Law & Contemp. Prob. 160.] The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses, and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit. [Citing *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54.] The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, [citing *The Robert Edwards*, 6 Wheat. 187, 190] from which the jury may with reason make that inference."

Obviously this Court could not have intended that last sentence as it actually reads. The obligation of the employer to pay damages does not arise when there is proof, even though entirely circumstantial, from which the jury "may" with reason make that inference. Such obligation arises only if and when the jury, on such reasonable evidence, actually draws that inference and incorporates it

into a verdict for plaintiff. There may be other, conflicting evidence, from which the jury may with equal reason draw a contrary inference. The whole passage just above quoted sounds startlingly as if this Court conceives that any jury, whenever allowed by the trial judge to do so, will inevitably draw the necessary inference to support award of damages in favor of the plaintiff employee and against the defendant employer. That may be true. But it surprises us that this Court should use language suggesting that it is true.

In view of the extent to which Congress has "stripped" defendants in these cases of all common-law defenses, and in view of the fact that there is no legal defense left except the one that the plaintiff has not met his burden of proof, has not adduced sufficient evidence to support a reasonable inference and finding that injury or death *resulted* "in whole or in part" from the negligence of the defendant, it would seem that this Court ought not to be astute to allow juries to base verdicts for damages on evidence sufficient only to support a mere speculation or conjecture that the defendant was negligent and that the injury or death resulted "in whole or in part" from such negligence.

There was, of course, much metaphysical formalism in the development of the common-law principle of "proximate causation," in the talk about "*causa causans*," "sole, active, efficient, proximate cause," and other like expressions. Unquestionably Congress, by writing the words "in whole or in part" into this statute, made very substantial modifications in the common-law doctrine of proximate causation. One can hardly confine causation to what is "proximate" in the common-law sense when the statute imposes liability for negligence from which the casualty resulted "in whole or in part." But that does not mean that the whole doctrine of "causation" itself is abolished. Negligence from which the casualty did not *result* in whole or in

part cannot be the basis of liability. Evidence upon which a jury cannot reasonably base an inference or finding that carrier negligence caused a casualty at least "in part" cannot lawfully be made the basis of a jury award of damages under the FELA. And evidence sufficient only to enable a jury to speculate or conjecture as to carrier negligence and as to its causal relation to the casualty, even if only in part, or as this Court said in No. 28, even if only "in the slightest" part, ought not to be allowed to support a verdict awarding damages.

The course of decisions of this Court in these cases, particularly since the 1939 amendment of the FELA became effective, has brought forth strong and sincere protests from distinguished members of this Court. In the case of *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350 (1943), so constantly relied on by plaintiffs in these cases, and here especially relied on by petitioner Webb, the late Mr. Justice Roberts was impelled to say, at p. 358:

> "Finally, I cannot concur in the intimation, which I think the opinion gives, that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault. I yield to none in my belief in the wisdom and equity of workmen's compensation laws, but I do not conceive it to be within our judicial function to write the policy which underlies compensation laws into acts of Congress when Congress has not chosen that policy but, instead, has adopted the common law doctrine of negligence."

On a broader plane, the late Mr. Justice Jackson said in his separate opinion, concurring in the result, in *Brown* v. *Allen*, 344 U. S. 443 (1953), at p. 535:

"Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles."

Again, in the same opinion, he said, at p. 540:

"* * * There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final."

Finally, in the same opinion, Mr. Justice Jackson said, speaking from his heart, at p. 546:

"* * * But I know of no way that we can have equal justice under law except we have some law. * * *"

Point IV

We submit that the course of this Court's FELA decisions since Brady v. Southern Railway Co., 320 U.S. 476 (1943), has undermined all the "smallest part" of the law of negligence left in the statute by Congress and that that course should be checked now, at this Term, so as at least to leave in life the principles (1) that jury verdicts in these cases may not be supported upon a mere scintilla of evidence, and (2) that juries may not be allowed to base verdicts for plaintiffs in these cases on pure speculation and conjecture, either as to railroad negligence or as to causal relation between such negligence and the injury to or death of an employee.

Under this head we shall be as concise as humanly possible. We again cite the above-cited article in 18 Law and Contemp. Prob. 110-159, which contains a comprehensive review and analysis of every FELA decision by this Court from *Brady* v. *Southern Railway Co.*, 320 U. S. 476 (1943), to and including *Stone* v. *New York, C. & St. L. R. R.*, 344 U. S. 407 (1953). We also attach as an appendix to this brief a short summary of the decisions by this Court in FELA cases since *Stone* v. *New York, C. & St. L. R. R.*, 344 U. S. 407 (1953), the last decision analyzed in that article

III

CONCLUSION

Our conclusion is a restatement of our Point IV, *supra*, which we request the Court to consider here as if repeated verbatim.

We further respectfully submit that the decision of this Court in this case is in conflict with the decisions by this Court in the following cases:

Brady v. *Southern Railway Co.*, 320 U.S. 476 (1943);
Eckenrode v. *Pennsylvania R.R. Co.*, 335 U.S. 329 (1948);
Reynolds v. *Atlantic Coast Line R.R. Co.*, 336 U.S. 207 (1949);
Moore v. *Chesapeake & O. Ry. Co.*, 340 U.S. 573 (1951).

Respectfully submitted,

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APPENDIX

Cases under FELA decided by this Court since *Stone* v. *New York C. & St. L. R. Co.*, 344 U.S. 407 (1953).

1953 TERM

No Cases

1954 TERM

Smalls v. *Atlantic Coast Line R.R. Co.*, 348 U.S. 946 (1955).

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. Justices Reed, Burton & Minton dissented. The facts are taken from the opinion of the Court of Appeals, 216 F. 2d 842 (C.A. 4, 1954).

The plaintiffs were standing at a railroad crossing waiting to be picked up by one of the railroad's trains for transportation to a safety meeting sponsored by the railroad. Attendance at the meeting was voluntary, but encouraged. While waiting for the train, plaintiffs were struck by an automobile driven by a person having no connection with the defendant railroad. The plaintiffs contended that the railroad had not provided them with a safe place to work in that the crossing was not lighted. A judgment for plaintiffs on a jury verdict was reversed by the Court of Appeals, on the ground that there was no evidence that the defendant was negligent. The plaintiffs were neither invited nor ordered to stand at the crossing, and a station, apparently lighted, was only some 200 yards away.

O'Neill v. *Baltimore & Ohio R. Co.*, 348 U.S. 956 (1955).

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. There were no dissents. The facts are taken from the opinion of the Court of Appeals, 211 F.2d 190 (C.A. 6, 1954).

The plaintiff, a boilermaker, was installing a heavy steel ash pan with the assistance of another employee. While the pan was being lifted into position, a new bolt broke causing the pan to fall on plaintiff who was standing below guiding the pan into position. The bolt had been selected by plaintiff from defendant's stores and had been used to attach a chain to the pan for lifting purposes. The type of bolt and method of lifting had been used many times before. No evidence was introduced as to what caused the bolt to break. The case was submitted to the jury on the theory of *res ipsa loquitur*, and the trial court entered a judgment on the jury verdict for plaintiff. The Court of Appeals reversed, one judge dissenting, holding that the inference of negligence arising under the *res ipsa* doctrine was rebutted by the evidence that the bolt was new and that defendant had purchased it from a manufacturer without any knowledge of a defect. A new trial was ordered. The Supreme Court ordered the judgment of the trial court reinstated.

1955 TERM

Neese v. *Southern Ry. Co.*, 350 U.S. 77 (1955).

The Supreme Court reversed the decision of the Court of Appeals below in a short *per curiam* opinion. There were no dissents. The facts are taken from the opinion of the Court of Appeals, 216 F.2d 772 (C.A. 4, 1954).

The employee had been killed by what the jury found and the lower courts affirmed to be defendant's negligence. The jury returned a verdict of $60,000 in damages, and the trial judge ordered the verdict set aside unless a remittitur of $10,000 was made. This was done and a judgment for $50,000 in damages entered. The employee was 22 at the time he was killed, and was survived by his father, 60, and his mother, 47. At the most, about a quarter of his salary—which averaged $2,200 over a three-year period—had been contributed to his parents. His mother testified that she expected the deceased to have contributed about $2500 a year to his parents after four or five years. The Court of Appeals held that this testimony was too im-

probable to be given credence in view of the contributions of the deceased in the past and his expected future salary allowing for expected increases. Even with the benefit of all doubts, damages of more than $39,000 could not properly be awarded. A new trial on the issue of damages was awarded. The Supreme Court granted certiorari to consider whether the Court of Appeals had jurisdiction to review the action of the District Court. Without reaching the jurisdictional question, and to avoid a constitutional question, the Supreme Court reversed the Court of Appeals and reinstated the judgment of the trial court, since "the action of the trial court was not without support in the record." No indication was given in the opinion as to the nature of that support.

Schulz v. Pennsylvania R. Co., 350 U. S. 523 (1956).

This was a Jones Act case. An employee of the railroad was drowned while working as a tug fireman. Four of defendant's tugboats were docked side by side. Three of the boats were unlighted and dark, and the fourth was only partially illuminated by a spotlight on the pier. The temperature was below freezing and there was some ice on the boats. The deceased had been assigned to work on all four boats because the defendant did not have enough workers on hand properly to perform the duties assigned the deceased. There was no witness to the drowning. When the body was recovered, it was only partially clothed and a flashlight was clutched in one of its hands. When last seen, the deceased had been going to a cabin on one of the boats to change his clothes and the clothes he had been wearing were found in the cabin. A jury verdict for the plaintiff was set aside by the trial judge on the ground that there was no evidence to show that defendant's negligence was the proximate cause of the accident. The Court of Appeals affirmed, but the Supreme Court reversed and reinstated the verdict. The Court held that although there was evidence supporting inferences to the contrary, the evidence was also sufficient to support an inference that the plaintiff slipped on the ice and fell overboard while groping around in the dark with the aid of only a flashlight and

that it is the duty of the jury to choose between conflicting inferences, which it may do even if it has to rely on speculation. Justices Reed, Burton, and Minton dissented, and Justice Frankfurter would have dismissed the writ of certiorari as improvidently granted.

Anderson v. *Atlantic Coast Line R. Co.*, 350 U. S. 807 (1955).

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. Justices Reed, Frankfurter, Burton, and Harlan dissented on the ground that certiorari should not have been granted. The facts are taken from the opinion of the Court of Appeals, 221 F. 2d 548 (C.A. 5, 1955).

A conductor was killed while directing a switching operation. A refrigerator car was being moved by attaching it to an engine with a 14 foot chain and "jerking" it. This was a usual practice. While attempting to detach the chain, which he approached from the wrong side, the deceased was caught in it and crushed to death when the car continued rolling. The only eyewitness was the engineer, who testified that he could not have handled the engine so as to avoid the accident. The principal claim of negligence apparently was grounded on the failure of the engineer to warn the conductor of his danger by blowing the engine's whistle. A judgment on a jury verdict for the plaintiff was reversed by the Court of Appeals, which held that the engineer had no duty to blow the whistle and warn the deceased. The deceased was in charge of the operation, was an experienced employee, and seemed to be performing a usual function in a usual manner. The Supreme Court reinstated the judgment entered by the trial court.

Strickland v. *Seaboard Air Line R. Co.*, 350 U. S. 893 (1955).

The Supreme Court in a *per curiam* opinion reversed a decision of the Supreme Court of Florida, citing *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350. There were no dissents. The facts are taken from the opinion of the Florida Supreme Court, 80 So.2d 914 (1955).

The plaintiff was changing an outside brake beam, weigh-

ing 118 pounds, on a pullman car, with the assistance of three others. This was being done over a flat roadbed, where the car had broken down. The roadbed was filled with sand and gravel, as usual. It was necessary for the plaintiff to work in a stooped or squatting position, and the work was done at night with the aid of a flashlight and a carbide light. This was the usual lighting, but an electric light on a drop cord was available. The plaintiff had requested the use of the electric light, but it was not furnished until after the accident. The plaintiff slipped and fell against a switch box. He testified that he did not know what caused him to slip. A track over a pit was nearby and available. This would have enabled the plaintiff to stand and to have the assistance of another for the inside work, and was safer than working over the flat track. The customary practice of the defendant railroad was to do the work over the flat track, although other railroads used a pit when convenient. A judgment for plaintiff on a jury verdict was reversed by the Florida Supreme Court. It held that the defendant had not negligently failed to supply plaintiff with a safe place to work, as alleged. While using the track over the pit was safer, there was no evidence that using the track over a flat road bed was not safe also and defendant was not required to change its usual practice when not unsafe in itself. The Supreme Court ordered the judgment in the trial court reinstated.

Cahill v. *New York, New Haven & Hartford R. Co.*, 350 U. S. 899 (1955).

The Supreme Court reversed *per curiam* and without opinion the decision of the Court of Appeals below. Justice Reed dissented, and Justices Frankfurter, Burton, Harlan, and Reed would have denied certiorari. The facts are taken from the opinion of the Court of Appeals, 224 F. 2d 637 (C.A. 2, 1955).

The plaintiff was a brakeman assigned to flag eastbound motor traffic at a junction. He had never done such work before, and was warned to be careful. While doing this work, the plaintiff turned his back on the traffic to look around at a car on a train stalled at the junction. At that

moment, a stopped truck started up and struck plaintiff before he could get out of the way. The Court of Appeals reversed a judgment on a jury verdict for plaintiff. With regard to plaintiff's contention that the defendant was negligent in not providing him with a safe place to work, the Court of Appeals held that according to the evidence the plaintiff had been stationed at the safest spot, although it admittedly and necessarily involved some danger. The Court of Appeals also held that the defendant was not negligent in failing properly to instruct the plaintiff, since no conceivable instructions could have guarded the plaintiff against the negligence of the truck driver. A dissenting judge contended that the defendant was negligent in failing to instruct the plaintiff, new at the particular job, not to turn his back on the motor traffic. If the plaintiff had been facing the traffic, he would have seen the truck start up in time to jump out of the way.

The Supreme Court ordered the judgment of the trial court reinstated. Its mandate was subsequently modified to remand the case to the Court of Appeals for consideration of a matter not previously passed upon. This dealt with the admissibility of evidence of prior accidents at the junction. 351 U. S. 183 (1956).